2022/ADD/52 Federation International de Ski (FIS) v. Ms Valentyna Kaminska

ARBITRAL AWARD

delivered by the

ANTI-DOPING DIVISION
OF THE COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Raphaëlle Favre Schnyder, Attorney-at-law, Switzerland

in the arbitration between

Federation Internationale de Ski, Switzerland

Appearing through Dr. Stephan Netzle and Dr. Mirjam Koller, TIMES Attorneys, Zurich, Switzerland

Claimant

and

Ms Valentyna Kaminska, Ukraine

Respondent

I. PARTIES

1. The International Ski and Snowboard Federation ("FIS") is the International Federation governing international skiing and snowboarding, including Alpine Skiing, Cross-Country Skiing, Ski Jumping, Nordic Combined, Freestyle Skiing and Snowboarding.

2. Ms Valentyna Kaminska (the "Athlete" or "Respondent") is a cross-country skier from Ukraine and was registered to participate and to represent the National Olympic Committee of Ukraine in the Olympic Winter Games Beijing 2022.

II. FACTUAL BACKGROUND

3. The Athlete, born on 5th September 1987, is a Ukrainian cross-country skier who has been competing internationally since at least 2006.

4. The Athlete was registered to take part in the Beijing Winter Olympics, where she competed in the following three events:

   a) woman's print free on 8 February 2022 where she placed 70th;
   b) women's 10-kilometre classic on 10 February 2022 where she placed 79th;
   c) women's 4 x 5km Relay on 12 February 2022 where she and her team placed 18th.

5. Following the woman's 10-kilometre classic event on 10 February 2022 the Athlete was subject to an In-Competition doping control under the Testing Authority and Result Management Authority of the IOC and sample number A and B 7048066 was collected from her.

6. On her doping control form (the "DCF") referring to medication or supplements taken in the seven days prior to the doping control, the Athlete indicated having used *Syberian - sports gel Isotonic (Nutrend) Stimol Vitamin E Vitamin D Vitamin C Zinc Picolinate Coenzyme Q10 Amber acid Sedafiton forte*. She also confirmed on her DCF that the sample collection was undertaken in accordance with the relevant procedures for sample collection.

7. On 15 February 2022, the WADA-accredited National Anti-Doping Laboratory in Beijing, China (the "Laboratory"), reported AAFs for mesterolone metabolite nd3α-hydroxy-1α-methyl-5α-androstan-17-one ("Mestaminole") which is a substance is prohibited by WADA at all times and is classified as a non-specified substance under Section S1(1) (Anabolic Androgenic Steroids) of the 2022 WADA Prohibited List as well as for 5-methylhexan-2-amine (1,4-dimethylpentylamine) ("MHA"); and heptaminol ("Heptaminol") which are substances prohibited by WADA in-competition and are classified as specified substances under Section S6 (Stimulants) of the 2022 WADA Prohibited List (the "Prohibited Substances").

8. The other members of the Athlete's relay team in the Women's 4x5km Relay, Ms Viktoriya Olekh, Ms Maryna Antsybor, Ms Darya Rublova, were subjected to target testing between 12 February 2022 and 20 February 2022 and all samples provided negative results.

9. The initial review conducted by the ITA under Article 7.2.2 of the IOC ADR and Article 5.1.1 of the International Standards for Result Management found no applicable Therapeutic Use Exemption ("TUE") no apparent departure from the International Standard for Testing and Investigations or from International Standards for Laboratories that could have undermined the validity of the AAF and that the AAF was not caused by the ingestion of the Prohibited Substances through a permitted route insofar as anabolic steroids and stimulants are banned irrespective of their route of ingestion.

10. On 16 February 2022, the ITA, on behalf of the IOC, notified the Athlete of the AAF, provisionally suspended her and informed her that she would have to indicate that same day whether she wished to have the B-sample analysed failing which she would be deemed to waive her right to B-sample analysis and she would be deemed not to challenge the AAF.

11. Upon information by the National Olympic Committee of Ukraine (the "NOC") that the Athlete would not be able to respond within the deadline set as she was on her way to the airport with limited access to the internet, the Athlete was granted a new deadline until 18 February 2022 for requesting the B-sample analysis. The ITA granted the Athlete a further extension until 21 February 2022.

12. On 19 February 2022, the ITA informed the Athlete that the estimated concentrations of the Prohibited Substances are found in her substance were as follows:

(i) mesterolone metabolite 3α-hydroxy-1α-methyl-5α-androstan-17-one – 6 ng/mL;
(ii) 5-methylhexan-2-amine (1,4-dimethylpentylamine) – 1600 ng/ml;
(iii) heptaminol – 3000 ng/ml.

13. On 21 February 2022, the Athlete returned the B-sample arrangements form, wherein she stated that she did not accept the AAF, that she did request the opening and analysis of the B-sample, but that she did not request the laboratory documentation package. The Athlete was provisionally suspended on the same day.

14. The B-sample opening and analysis took place on 23 February 2022. It confirmed the findings of the A-sample.

15. On 9 March 2022, the ITA provided a Notice of Charge ("Notice Letter") to the Athlete and invited her to submit a response by 23 March 2022.

16. On 18 March 2022, the Athlete raised the possibility of contaminated nutritional supplements as the cause of her AAF. She requested further time to organise testing of the supplements due to logistical problems caused by the war in Ukraine.

17. Following a request from the ITA, on 28 March 2022, the Athlete provided information relating to her supplement usage. She provided further information on 8 and 10 May 2022.

18. On 10 June 2022, the Athlete shipped four supplements to the ITA, which were subsequently transferred to the WADA-accredited laboratory in Lausanne for analysis.

19. The Lausanne laboratory returned a pre-evaluation report on 17 July 2022 and a final report on 26 July 2022. The laboratory found that the supplements supplied tested negative for all three of the Prohibited Substances found in the Athlete's sample.

20. The results were notified to the Athlete on 27 July 2022, and she was requested to respond with her explanations to the matters set out in the Notice of Charge dated 9 March 2022.

21. On 8 August 2022, the Athlete provided her response to the Notice Letter stating that she could not explain how the prohibited substances got into her system but that she did not take them intentionally.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

22. On 19 October 2022, the IOC filed an application pursuant to Article 8.1.1 of the IOC Anti-Doping Rules applicable to the Games of the XXIV Olympic Winter Games Beijing 2022.

23. By letter dated 20 October 2022, the CAS ADD Office acknowledged receipt of the Request for Arbitration and informed the Parties that it had been assigned to the Anti-Doping Division of the Court of Arbitration for Sports (the "CAS ADD") pursuant to Article S20 of the Code of Sports related Arbitration. Further, the FIS was invited to inform the CAS ADD, by 24 October 2022, whether it intends to join these arbitral proceedings as Co-Claimant and the Athlete to submit her Answer as soon as the question of the participation of the FIS would be solved. Further the Parties were invited to liaise and revert back with their chosen arbitrator by 27 October 2022 failing which, the President of the ADD would appoint a Sole Arbitrator. The Athlete was invited to object to the use of English as procedural language within 3 days.

24. On 22 October 2022, the Athlete confirmed her agreement to the use English as procedural language.

25. By email dated 24 October 2022, FIS informed the CAS ADD Office of its intent to join these proceedings as Co-Claimant since it will be in charge of the non-Olympic consequences imposed on the Athlete.

26. On 6 March 2023, the Sole Arbitrator issued a Partial Award finding that Ms Valentyna Kaminska had committed an anti-doping rule violation pursuant to Article 2.1 and/or Article 2.2 of the IOC Anti-Doping Rules applicable to the Games of the XXIV Olympic Winter Games Beijing 2022 and declared that with the issuance of this Partial Arbitral Award, the IOC's participation in this proceeding was hereby terminated.

27. On 16 March 2023, the CAS ADD Office submitted to the FIS and the Athlete the Sole Arbitrator's proposal for the procedural calendar for the second part of the proceedings with regard to the consequences of the ADRV which may be imposed on the Athlete.

28. Following FIS' agreement with the proposed procedural calendar and the Athlete's silence, by letter dated 22 March 2023, the CAS ADD Office invited the FIS to submit its preliminary request for relief within a period of 10 days.

29. On 3 April 2023, the CAS ADD Office acknowledged receipt of the preliminary request for relief submitted by FIS on same date ("Preliminary Request") and invited the Athlete to submit her response within 20 days.

30. On 24 April 2023, the CAS ADD Office acknowledged receipt of the Athlete's Answer dated 22 April 2022 and invited FIS to file its Reply within 20 days.

31. On 16 May 2023, the CAS ADD Office acknowledged receipt of the FIS Reply submission filed on 15 May 2023 and further noted that the FIS considered that a hearing is not necessary and that the Sole Arbitrator can decide this matter based solely on the Parties' written submission.

32. On 15 June 2023, the CAS ADD Office informed the Parties that the Sole Arbitrator deemed herself sufficiently informed to render an Arbitral Award (on the sanction beyond the Olympic Games) based on the Parties' written submissions, without holding a hearing. Furthermore, the Parties were invited to sign and return a copy of the Order of Procedure to the CAS ADD Office by 20 June 2023.

33. On 15 and 18 June 2023 respectively, the Athlete and FIS signed and returned the Order of Procedure.

IV. SUBMISSIONS OF THE PARTIES

A. The Claimant

34. The FIS relies on its Notice letter with which it had informed the Athlete of the consequences of her ADRV that may apply outside of the Olympic Games.

35. In the Notice Letter the FIS notified the Athlete that

- the Athlete does not have a Therapeutic Use Exemption ("TUE") to justify the Presence of the Prohibited Substances in her system and

- there is no apparent departure from the International Standard for Testing and Investigations or from the International Standard for Laboratories that could reasonable have caused the AAF.

- as this is the Athlete's first ADRV, she would be subject to Consequences specified in Article 10 FIS ADR for a first offence, namely:

  3.3.1 A period of Ineligibility (subject to potential elimination, reduction or suspension pursuant to Articles 10.5, 10.6 and 10.7 FIS ADR) of four years, unless you can establish that the ADRV was not intentional, in which case the period of Ineligibility shall be two years;

  3.3.2 Automatic publication of sanction

- any period of Ineligibility imposed may be:

  3.4.1 Increased because of Aggravating Circumstances as defined in Article 10.4 FIS ADR.

  3.4.2 Eliminated completely, if she can establish No Fault or Negligence pursuant to Article 10.5 FIS ADR.

  3.4.3 Reduced, if she can establish No Significant Fault or Negligence within the meaning of Article 10.6 FIS ADR.

  3.4.4 Reduced by up to a maximum of half of the period of Ineligibility otherwise applicable if she promptly admit the charge of committing an ADRV pursuant to Article 10.7.2 FIS ADR.

  3.4.5 Partially suspended, if you assist FIS in uncovering and/or establishing one or more ADRVs by another Athlete or Athlete Support Personnel (e.g. coach, physiotherapist, etc.) pursuant to Article 10.7.1 FIS ADR.

36. In addition, the Athlete was informed of the provisional suspension imposed on her as from 21 February 2022 in accordance with Article 7.4.1 FIS ADR.

37. The FIS refers to the Athlete's undated letter explaining her actual circumstances as a refugee in Estonia and admitting to the ADRV, accepting the Consequences of this violation, waiving her right to a Hearing and agreeing that any decision be taken on the basis of the written statements, declaring that the ADRV was not intentional and offering to provide clarification and information to the Anti-Doping Authorities to the best of knowledge and belief.

38. For the evidentiary proceedings relating to the consequences of the admitted ADRV, the FIS further relies entirely on the Partial Award dated 6 March 2023 which has a biding effect on the present proceedings based on several legal sources, namely Article 15.1.1 WADC, Article 15.1.1 FIS ADR, Article 3.2.4 WADC, Article 3.2.4 FIS ADR and the fundamental principle of *res iudicata* as constantly applied by the CAS.

39. The FIS also notes that the Partial Award dated 6 March 2023 has not been appealed by the Athlete and is therefore final and binding.

40. As a consequence of the admitted fact, that one of the three the prohibited substances identified in the Athlete's sample was a non-specified substance, the standard period of ineligibility for a violation of Article 2.1 FS ADR pursuant to Article 10.2. FIS ADR shall be four (4) years unless the Athlete can establish that she did not act intentionally. The fact that two of the three prohibited substances identified in the Athlete's sample qualify as specified substance does neither lower the applicable standard sanction nor does it reverse the burden of proof. The multitude of prohibited substance could rather be considered as Aggravating Circumstance leading to an increase of the otherwise applicable period of ineligibility, based on Article 10.4 FIS ADR.

41. The FIS considers that the Athlete has not proven that the ADRV was not intentional and can therefore not benefit from any reduction of the standard sanction.

42. Although the Lausanne Laboratory on behalf of ITA had analysed eight samples of five of the fourteen supplements listed by the Athlete on her Doping Control Form, none of them were found to contain mesterolone, 5-methylhexan-2-amine and heptaminol. Nine other supplements allegedly used by the Athlete were not made available by her for testing because the war made it impossible for her to procure the supplement samples. Also, the fact that her samples provided on 27 November, 10 December and 21 November 2021 were found "clean" and that she was never accused of trying to evade doping controls is not evidence of non-intention nor is her acceptance of the analytical finding and her cooperation with the ITA to "clarify all the details of my case".

43. To the contrary, FIS considers that the fact that not only one but three prohibited substances were found in the Sample renders contamination unlikely. Considering the impressive number of daily supplements listed by the Athlete, she has not evidenced that she had applied uttermost caution to avoid that a prohibited substance enters her body and failing to inquire as to whether a product contains a prohibited substance constitutes significant fault in and of itself, according to CAS precedent (see e.g. CAS OG 04/003; CAS 2006/A/1067).

44. The FIS concludes that it is simply not enough to point to the theoretical possibility of a contamination of the 15 nutritional supplements she allegedly used, without any further substantiation, let alone evidence. The fact that the Athlete submits that she had been using 15 different supplements from unknown sources each day without any precautionary measures such as testing and in particular without seeking any expert advise regarding the risk of such use, despite the loud and clear warnings by national and international Anti-Doping Organisations could even be considered as reckless in the sense of the second of the two prongs of the explanation of Article 10.2.3 FIS ADR of what it means by intentional.. It might also be spoken of as culpable obliviousness to risk.

45. Thus, the FIS submits that the Athlete did not prove by any means that she did not intentionally or recklessly consume the prohibited substances.

46. For the sake of completeness, FIS also submits that Articles 10.5 or 10.6 FIS ADR are not applicable here although this has not explicitly been pleaded by the Athlete. According to

Article 10.7.2 FIS ADR, the otherwise applicable period of ineligibility can be reduced if an Athlete voluntarily admits the commission of an ADRV. However, such admission must be made before having received notice of the sample collection and that admission is the only reliable evidence of the violation at the time of admission. These requirements have not been met in the present case. Article 10.7.2 FIS ADR does therefore also not apply.

47. As the Athlete cannot prove on a balance of probabilities that the ADRV was not intentional, no reduction of the standard sanction based on Article 10.2 FIS ADR is justified. Furthermore, since the Athlete failed to establish how the Prohibited Substances entered her body, there is no justification to deviate from the standard sanction based on "No Fault" (Article 10.5 FIS ADR) and "No Significant Fault" (Article 10.6 FIS ADR). Therefore, the Athlete shall be sanctioned with the standard period of four (4) years of ineligibility.

48. The Athlete has been suspended since 21 February 2022. The period of suspension already served shall be credited to the sanction imposed by the CAS ADD. A four-year-suspension would therefore end on 20 March 2026

49. Accordingly, the FIS requests the CAS ADD to grant the following relief:

(1) To hold and confirm that the Athlete has committed an anti-doping rule violation (ADRV) pursuant to Article 2.1 and/or Article 2.2 of the FIS Anti-Doping Rules.

(2) To order that the Athlete shall serve a period of Ineligibility of four (4) years, beginning on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed.

(3) To order that the Athlete shall receive a Credit for the Provisional Suspension already served.

(4) To order that the Athlete shall to pay a fair contribution to the costs of the Claimant related to this arbitration.

B. The Athlete

50. The Athlete confirms the statements made on 24 November 2022 that she had very limited ability to investigate how the Prohibited Substances had entered her system as at the moment she resides in Estonia as a refugee. She believes that the Prohibited Substances have entered her body through contamination by supplements and that she had been using and is unable to submit all supplement for testing, as they are fabricated in Ukraine and because of the war, she was unable to obtain the same batches or because they are not produced and sold any more.

51. She considers having taken all possible steps to determine the source of the Prohibited Substances which have entered her system. Unfortunately, even with the help of the ITA in testing the supplements for which she had provided a list indicating the dosage and timing of intake, she was unable to do so. The main reason being the war in Ukraine that rendered it impossible for her to procure all the listed supplements for testing and that therefore it was impossible for her to prove that she was not at fault.

52. Further, she acknowledged the ADRV and stated that she understood that the consequences of this violation will be very serious and that her results in the Beijing Olympics will be annulled, and that she will face a severe sanction from FIS. The Athlete also stated that she has neither the physical nor the financial capacity to fully participate in the proceedings before the ADD and that she admits the ADRV hoping that her voluntary admission will lead to a lesser sanction.

53. The Athlete considers that these factors should be taken into account when assessing the consequences of the ADRV as they were in the awards CAS 2020/A/7579 and CAS 2019/A/6313 where the Panel held that .

"The establishment of the source of the prohibited substance in an athlete's sample is not mandated in order to prove an absence of intent. In other words, it is possible to prove - albeit with much difficulty - innocent exposure to prohibited substance in the absence of a credible identification of its source. However, as certitude with respect to the source of contamination decreases, so the athlete's chances of prevailing depend on a counterbalancing increase in the implausibility of bad motive and negligence. The doping hypothesis must no longer (on a balance of probability) make sense in all the circumstances, and the charge of recklessness must (on a balance of probability) be overcome. This can be proved by any means. Identification of the source is often important (but not in and of itself sufficient), but it is not indispensable. Assessing evidence in a manner that (i) begins with the science and then (ii) considers the totality of the evidence (iii) through the prism of common sense, possibly (iv) "bolstered" by the athlete's credibility, is a process that appears to be legitimate as a way of achieving its intended effect of enforcing the rules without finding comfort in the cynical view that occasional harm done to an innocent athlete is acceptable collateral damage."

54. In CAS 2019/A/6313, the Panel also concludes that the length of time taken to analyse the "A" Sample makes it impossible for the athlete to discover the source of the Prohibited Substance:

"Aggravating this situation of course is the slowness of the lab's notification of the results of its analysis of the A sample. The Panel agrees with the Athlete that this inexplicable tardiness may well have caused potentially relevant evidence regarding the source of the prohibited substance to become unavailable to him."

55. The athlete considers that the factor that made it impossible to verify all possible sources of Prohibited Substances it's the war in Ukraine which was out of her control. And which is the reason why only five of the 14 supplements she had taken were analyzed and nine others were not available, despite all my attempts to buy new, sealed packages and send them to ITA. Among those supplements that could not be made available for testing were products manufactured in Ukraine (Succinic acid), Poland (Dekap) and Russia (Muscle Relief Gel and Flax Oil).

56. The Athlete further states that Cases of detection of contamination of supplements produced in Eastern Europe and Russia with Prohibited Substances are very frequent and while the exact number of these cases is unknown, because anti-doping agencies do not always publish this information, one of the recent cases is that of US tennis player of Ukrainian origin Varvara Lepchenko who was poisoned by Bemityl, a Ukrainian product contaminated with modafinil.

57. The Athlete is therefore convinced that she became a victim of sports nutrition poisoning as in her case there is no question of intentional doping to improve sports results. To the contrary, intentionally taking so many Prohibited Substances into the Olympic season simply would not make sense, as any athlete understands that the frequency of testing will increase, and at the Olympics they will be almost mandatory. For the Olympic season she gave samples on 27 November, 10 December and 21 December 2021, all of them were "clean". Also, she has never been accused of trying to evade doping controls.

58. After receiving the result of the analysis of the sample from the Olympic Games, she took all possible steps and actively cooperated with the ITA to clarify all the details of her case.

59. Hence, the Athlete stated as follows:

1. *I admit to violating anti-doping rules.*

2. *I accept the consequences of this violation.*

3. *I waive my rights the hearing in this case, and I agree to the decision to be based on written statements.*

4. *I will provide any information or clarification of interest to the Anti-Doping Authorities to the best of my knowledge and belief.*

5. *I declare that the violation was not intentional.*

V. JURISDICTION

60. According to Article 8.1.1 FIS ADR, FIS has delegated its Article 8 responsibilities (first instance hearings, waiver of hearings and decisions) to the CAS ADD.

61. The procedural rules of CAS ADD pertaining to the hearing of first instance shall apply.

62. Article A2 CAS ADD Rules reads as follows:

"CAS ADD shall be the first-instance authority to conduct proceedings and issue decisions when an alleged anti-doping rule violation has been filed with it and for imposition of any sanctions resulting from a finding that an anti-doping rule violation has occurred. CAS ADD has jurisdiction to rule as a first-instance authority on behalf of any WADC signatory which has formally dele-gated its powers to CAS ADD to conduct anti-doping proceedings and impose applicable sanctions."

63. The corresponding provision in the FIS ADR is Article 8.1.2.1:

"When FIS sends a notice to an Athlete or other Person notifying them of a potential anti-doping rule violation, and the Athlete or other Person does not waive a hearing in accordance with Article 8.3.1 or Article 8.3.2, then the case shall be referred to the CAS ADD for hearing and adjudication, which shall be conducted in accordance with the principles described in Articles 8 and 9 of the International Standard for Results Management."

64. The jurisdiction of the CAS ADD is not disputed by the Parties who have confirmed it by signing and returning the Order of Procedure.

65. The Sole Arbitrator shall apply the rules and regulations of the FIS, in particular the FIS ADR 2021, which apply to the questions of which Anti-Doping Rule has been violated and which sanction applies, including any procedural matters. Subsidiarily, Swiss law shall apply.

66. Accordingly, the CAS ADD has jurisdiction to hear the dispute.

VI. APPLICABLE LAW

67. Article A20 of the CAS ADD Rules provides that:

"[t]he Panel shall decide the dispute according to the applicable ADR or the laws of a particular jurisdiction chosen by agreement of the parties or, in the absence of such a choice, according to Swiss law."

68. There is no agreement between the Parties as to the application of any particular law. The application falls to be determined by reference to the FIS ADR and Swiss law, on a subsidiary basis.

VII. LANGUAGE OF THE ARBITRATION

69. Pursuant to Article 4 of the CAS ADD Rules,

"*CAS ADD working languages are English, French and Spanish. In the absence of agreement between the parties, the President of the Panel or, if not yet appointed, the President or Deputy President of CAS ADD shall select one of these three languages as the language of the arbitration at the outset of the procedure, taking into account relevant circumstances then known. Thereafter, the proceedings shall be conducted exclusively in that language, unless the parties and the President of the Panel otherwise agree.*"

70. The Parties have agreed to the use of English as language for this arbitration.

VIII. MERITS

71. In her Partial Award dated 6 March 2023, the Sole Arbitrator has found that the Athlete has committed an ADRV in violation of Article 2.1 or 2.2 IOC ADR which correspond to the FIS ADR. Considering the binding effect of the Partial Award pursuant to Art. 3.2.4 FIS ADR, the principles of res iudicata and most particularly, the Athlete's own admission of her ADRV, the issue of the present proceeding is to determine the proportionate sanction based on the applicable FIS ADR.

72. Article 10.2 FIS ADR states in relevant parts as follows:

"The period of Ineligibility for a violation of Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential elimination, reduction or suspension pursuant to Articles 10.5, 10.6 or 10.7:

10.2.1 The period of Ineligibility, subject to Article 10.2.4, shall be four (4) years where:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance or a Specified Method, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.

10.2.1.2 The anti-doping rule violation involves a Specified Substance or a Specified Method and FIS can establish that the anti-doping rule violation was intentional."

10.2.2 If Article 10.2.1 does not apply, subject to Article 10.2.4.1, the period of Ineligibility shall be two (2) years.

10.2.3 As used in Articles 10.2, the term "intentional" is meant to identify those Athletes or other Persons who engage in conduct which they knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance."

73. At paragraph 57 of the Partial Award, the Sole Arbitrator noted that Mesterolone metabolite 3α-hydroxy-1α-methyl-5α-androstan-17-one, 5- methylhexan-2-amine (1,4-dimethylpentylamine) and heptaminol were found in the Athlete's A-sample. The first substance is prohibited by WADA at all times and is classified as a non-specified substance under Section S1(1) (Anabolic Androgenic Steroids) of the 2022 WADA Prohibited List. The second and third substances are prohibited by WADA in-competition and are classified as specified substances under Section S6 (Stimulants) of the 2022 WADA Prohibited List.

74. Hence, as at least one of the Prohibited Substances found in the Athlete's Sample A and confirmed by the analysis of Sample B, is a non-specified substance, the standard sanction is a 4-year period of ineligibility, unless the Athlete proves that the anti-doping rules violation was not intentional. She, thus, needs to convince the Sole Arbitrator by a balance of probability (Article 3.1 of FIS ADR) that she lacked intentionality within the meaning of Article 10.2.3 FIS ADR.

75. The Athlete has repeatedly stated that the ADRV was not intentional and probably results form a contamination. At paragraph 19 of her Answer, she states that "*Intentionally taking so many Prohibited Substances into the Olympic season simply did not make sense, as any athlete understands that the frequency of testing will increase, and at the Olympics they will be almost mandatory*."

76. However, the Sole Arbitrator concurs with the holding of numerous CAS Panels, such as the Panel in CAS 2021/A/7579 and 7589, that denials and the appearance of sincerity are not sufficient as they are "*the common coin of the guilty as well as the innocent*" (para. 172). The Sole Arbitrator notes that besides the assertion that she did not act intentionally, the Athlete does not offer any further evidence, like testimonials, not even statements of support by the other members of her team.

77. The Athlete further states in her Answer that she did take all possible steps to determine the source of the Prohibited Substance but that even with the help of the ITA in testing the substances, she was unable to do so.

78. As also admitted by FIS in its submissions, "*while it is theoretically possible for an Athlete […] to establish that the anti-doping rule violation was not intentional without showing how the Prohibited Substance entered one's system, it is highly unlikely that in a doping case under Article 10.2.1 an Athlete will be successful in proving that the Athlete acted unintentionally without establishing the source of the Prohibited Substance*."

79. The Athlete relies in particular on the findings of the panel in the Award CAS 2021/A/7579 and 7589 in support of her allegation that she acted unintentionally but is unable to prove the origin of the contamination because of the war in Ukraine, the Panel summarized its finding in relevant parts as follows:

> *117. […] What must be shown is that on the balance of probability there was no intent or recklessness, and this can be proved by any means. Identification of the source is often important (but not in and of itself sufficient), but it is not indispensable.*
>
> *148. But unconscious contamination by the spiking of supplements in a manner which is of course not indicated on the label, or as a result of using the common facilities or equipment of a gym, does not lend itself to such proof. Still, it is not impossible. It is ultimately a question of evidence – what one means by the notion of proof. The rules require proof of the absence of a state of mind (intention or recklessness), and proving a negative is notoriously difficult. The Policy does not define what it means by proof, leaving the matter to be debated by the parties and resolved by the arbitrators.*

80. The Sole Arbitrator accepts that the war situation in Ukraine renders it difficult, if not impossible for the Athlete to procure for testing certain of the supplements she has used. She also notes the Athlete's argument that the identification of the source is not indispensable to admit that there was not intent.

81. However, the Sole Arbitrator concurs with the FIS that the fact that three different substances were found in the Athlete's Samples does lessen the probability of contamination.

82. Moreover, even if the Sole Arbitrator would accept that it must not be held against the Athlete that she could not prove no-intent as it was impossible for the Athlete to establish the origin of

the contamination because of the war, the Sole Arbitrator needs to consider also whether or not she "… *engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that rule*" as per the second of the two prongs of the Code's explanation in Article 10.2.3 FIS ADR (see Paragraph 3). For the second alternative to apply, two prerequisites need to be fulfilled. First, the Athlete must have known that her conduct involved a significant risk. Second, she must have manifestly disregarded that risk. Thus, in order to rebut the presumption that she acted intentionally, the Athlete must either show by a balance of probability that she did not know that her conduct involved a significant risk or that she did not manifestly disregard such risk.

83. It is well-known in the world of sport that particular care is required from an athlete when applying or using medications, because the danger of a prohibited substance entering the athlete's system is particularly high in such context, i.e. significant (e.g. CAS 2020/A/7299 no. 133 *et seq.*; CAS 2013/A/3327, no. 75; CAS 2016/A/4609, no. 68).

84. It is evident from the list supplied by the Athlete that not all supplements originated from Russia and Ukraine, but some of the supplements listed were produced in France, USA, Czech Republic, Poland and Germany and could therefore have been procured for testing. Thus, the Sole Arbitrator is not satisfied that the Athlete took all possible steps to determine the origin of the contamination.

85. Further, it appears from the list of supplements filed by the Athlete in these proceedings that she:

- Ingested daily an impressive number of supplements;
- Started using most of them in February 2022, i.e. in the month of the Olympic games;
- Did not have the pack for at least one of them (*Sedafiton forte*) as *"the team doctor gave out one pill at a time personally"*.

86. Pursuant to constant CAS jurisprudence, an athlete bears a personal duty of care in ensuring compliance with anti-doping obligations. The standard of care for Olympic athletes is very high in light of their experience, expected knowledge of anti-doping rules, and public impact they have on their particular sport. It follows that an Olympic athlete as top athlete must always personally take very rigorous measures to discharge these obligations. The CAS has specifically noted that the prescription of medicine by a doctor does not relieve the Athlete from checking if the medicine contains forbidden substances or not (As summarized by the panel in paras. 187 ff. of CAS 2017/A/5110).

87. The Sole Arbitrator finds that by accepting at least one pill at the time from the team doctor the Athlete did not act with the required uttermost care and took a significant risk that the conduct might constitute or result in an anti-doping rule violation as per Article 10.2.3 FIS ADR.

88. Hence, the Sole Arbitrator finds that the Athlete did not establish no intent as she was unable to prove how the products entered her system and in addition, by accepting "*one pill at a time*" of a supplement from her team doctor, showed a conduct that she knew or must have known might constitute or result in an anti-doping rule violation.

89. Therefore, the Sole Arbitrator finds that the Athlete has not discharged her burden of proving that the ADRV was unintentional and that she must be sanctioned with the standard period of ineligibility of 4 years as provided for by Art. 10.2 FIS ADR.

90. The Sole Arbitrator also notes that as the Athlete did not establish to the necessary standard how the prohibited substance entered his system, there is no room to eliminate or reduce the standard sanction based on Articles 10.5 or 10.6 FIS ADR and while acknowledging that the Athlete admitted the commission of the ADRV, she did so after having been notified of the sample collection which renders the reduction of the period of ineligibility pursuant of Article 10.7.2 FIS ADR inapplicable.

91. The Athlete has been suspended since 21 February 2022. The period of suspension already served shall be credited to the sanction of a 4-year period of ineligibility imposed and therefore the period of ineligibility should last until 20 February 2026.

IX. COSTS

(…).

X. APPEAL

97. Article 8 of the FIS ADR provides:

8.2 Notice of Decisions

8.2.1 At the end of the hearing, or promptly thereafter, the CAS ADD shall issue a written decision that conforms with Article 9 of the International Standard for Results Management and which includes the full reasons for the decision, the period of Ineligibility imposed, the Disqualification of results under Article 10.10 and, if applicable, a justification for why the greatest potential Consequences were not imposed.

8.2.2 FIS shall notify that decision to the Athlete or other Person and to other Anti-Doping Organisations with a right to appeal under Article 13.2.3, and shall promptly report it into ADAMS. The decision may be appealed as provided in Article 13.

98. Pursuant to Article A21 of the ADD Rules, this award may be appealed to the CAS Appeals Arbitration Division within 21 days from receipt of the notification of the final award with reasons in accordance with Articles R47 *et seq.* of the CAS Code of Sports-Related Arbitration, applicable to appeals procedures.

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ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Application filed by the *Fédération Internationale de Ski & Snowboard* on 3 April 2023 is upheld.

2. Ms. Valentyna Kaminska is found to have committed an anti-doping rule violation pursuant to Article 2.1 and/or Article 2.2 of the FIS ADR.

3. Ms. Valentyna Kaminska is is sanctioned with a period of ineligibility of four (4) years starting on the date on which the CAS award enters into force. The period of ineligibility served during the period of provisional suspension imposed on Ms Valentyna Kaminska from 21 February 2022 through the date of the present Award shall be credited against the total period of ineligibility.

4. (…).

5. (…).

6. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 7 November 2023

THE ANTI-DOPING DIVISION
OF THE COURT OF ARBITRATION FOR SPORT

Raphaëlle Favre Schnyder
Sole Arbitrator